HB2061
HD1 SD1

OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE
(MILITARY COMMUNITY AND FAMILY POLICY)
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The Honorable Brian Taniguchi
Chair, Senate Judiciary and Government Operations Committee
Hawaii State Capitol, Room 219
415 South Beretania Street
Honolulu, HI 96813

March 19, 2010

RE: HB 2061 SD1 Relating to Children: Child Custody (Evans)

On behalf of the Department of Defense, I would like to express some urgent concerns about legislation that will soon come before your committee. I appreciate your valuable time, but just want to take a few minutes to address some concerns regarding the policy outlined in HB 2061 SD1, a bill relating to child custody and Service members.

Many divorced Service members have custody of, or visitation rights with, children whose other parent is not the Service member's current spouse. Many of these Service members who are deployed away from their family sometimes find that state courts do not consider the unique aspects of military service when making custody decisions. The fundamental concern being addressed in this legislative subject matter is that military life creates unique opportunities and challenges that should be considered in total. Separations due to military duty should not in themselves be considered separately as a sole determinant in adjudicating a custody case.

Service members who are custodial parents should have some expectation that their military duty will not in itself be a determinant for custody. Unfortunately, SD1, amending HB 2061 HD1, essentially states that the fact that a Service member fulfills legally binding orders can serve as the basis for the non-custodial parent to petition for custody and the Service member faces the potential that his or her custody may not be reinstated only because s/he fulfilled those legally binding orders.

The Department of Defense believes the welfare of the child is of utmost importance; however, it also believes the demands of military service should not abrogate the parent's rights. The Department agrees with the American Bar Association's conclusion that States are in the best position to balance such equities. As a result, the ABA and DoD both oppose current federal legislation under consideration that opens the door for federal court oversight of state implementation of federal law. Instead, we are supporting state efforts to address the custody concerns our military families face due to deployment.

The policy put forth in the original language of HB 2061 HD1, and subsequently passed by the House, we believe, addressed our areas of concern related to Service members and child custody. However, when the bill was heard in the joint hearing with the Committee on Public Safety and Military Affairs and the Committee on Human Services last week, it was replaced by SD1, drafted and advocated by the Family Law Section of the Hawaii Bar Association.

The Hawaii Bar Association Family Law Section, principally Mr. Tom Farrell, has opposed the bill since the beginning. We have tried to work with them to develop a compromise bill, but they refuse to consider the following two elements, and have stated that they would oppose any bill that included them:

1. **Past absence due to military service should not serve as the *sole* basis for altering a custody order in place prior to the absence nor should the possibility of future absence be considered.**

   New Jersey's bill states: *the court shall not consider a parent's absence due to military duty, by itself, to be sufficient to justify a modification of a child custody or visitation order.*

   New Mexico uses the following language: *A mere absence of a parent due to temporary duty, deployment, activation or mobilization orders received from the military is not in itself a substantial and material change in circumstances affecting the welfare of the child.*

2. **The custody order in place before the absence of a military parent should be reinstated within a set time upon the return of the military parent, absent proof that the best interests of the child would be undermined. The non-absent parent should bear the burden of proof.**

   Washington State worded this section as follows: *Any temporary custody order for the child during the parent's absence shall end no later than ten days after the returning parent provides notice to the temporary custodian, but shall not impair the discretion of the court to conduct an expedited or emergency hearing for resolution of the child's residential placement upon return of the parent and within ten days of the filing of a motion alleging an immediate danger of irreparable harm to the child. If a motion alleging immediate danger has not been filed, the motion for an order restoring the previous residential schedule shall be granted*

   Alaska used the following language: *termination of the temporary order and resumption of the permanent order within 10 days after notification of the deployed parent's ability to resume custody or visitation unless the court finds that resumption of the custody or visitation order in effect before deployment is no longer in the child's best interest; the nondeployed parent shall bear the burden of proving that resumption of the order is no longer in the child's best interest*

HB 2061 as it now stands is actually *worse* for Service members who are stationed in Hawaii than current state law as the bill creates a policy that could put them at jeopardy of losing custody if they are deployed and requires that they must have a hearing, presumably hiring counsel, upon return from deployment to reinstate prior custody agreements. Not only would the required hearing

be time consuming but it would also be costly. In principle, we wonder why a parent who risks their life for their country should have to hire an attorney and go to court when they get home in order to have their children returned to them unless there is a compelling reason for them not to be returned. We could not support the policy currently in SD2 without the changes outlined above.

The Department of Defense would like to see the above two elements from HD1 inserted back into the SD1 version or the language of HD1 restored in place of SD1. The Department believes these additional protections assist in addressing the unique aspects of military service when balancing equities involved in decisions about child custody between parent's rights and the welfare of the children, and will strengthen state policy in this regard.

In addition, **section (h) of SD1 is problematic** as there are different rules in other countries related to Service of Process including a Hague Convention, which may not even apply to Afghanistan and Iraq. This section could be deleted. None of the bill's military-specific child custody changes should impact how service of process has always been handled in these cases.

I appreciate the opportunity to share the Department's concerns about the policy reflected in the current iteration of HB 2061 SD1, and hope that the Judiciary and Government Operations Committee will seriously consider making the necessary changes to restore vital protections for our Service members.

I assure you that this issue has the highest attention of those of us in leadership, including Secretary Gates. Please do not hesitate to contact me or my staff if you have any concerns or questions.

Laurie Crehan

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The Judiciary, State of Hawaii

Testimony to the Twenty-Fifth State Legislature, Regular Session of 2010
Senate Committee on Judiciary and Government Operations
The Honorable Brian T. Taniguchi, Chair
The Honorable Dwight Y. Takamine, Vice Chair
Wednesday, March 24, 2010, 9:30 a.m.
State Capitol, Conference Room 016

by

Thomas R. Keller
Administrative Director of the Courts

Bill No. and Title: House Bill No. 2061, H.D. 1, S.D. 1, Relating to Children.

Purpose: Statutorily establishes a process by which the Family Court can resolve matters regarding custody and visitation for service members of the United States armed forces, armed forces reserves, and National Guard whose military duties require temporary absences. Effective July 1, 2050.

Judiciary's Position:

The Judiciary has grave concerns about House Bill No. 2061, H.D. 1, S.D. 1.

We are mindful (and grateful) for the many sacrifices of the men and women of the armed forces. We are also in agreement with the principle behind this bill, that is, no deployed parent should lose custody and visitation rights solely due to being deployed.

However, the important principles and concerns of this bill are already covered by existing law, as well as the practices of Family Court. This bill, while it will not add protections, may very well cause greater problems to both deploying and non-deploying parents (bearing in mind that both parents are in the military in many families) and their children. At worst, this bill will cause an increase in litigation and uncertainty.

This bill seeks to ensure that deployed parents have a level playing field. Per the federal Servicemembers Civil Relief Act , Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50

U.S.C.S. app. §§ 501-596), deploying parents can ask for and are given stays to existing proceedings until their return. This means that, in most cases, the proceedings are "frozen" at the point in time that the "stay" is granted by the judge (because of the Family Court judges' flexibility, proceedings can occur when adequate communications can be arranged). Therefore, except when hearings can be satisfactorily arranged, no "permanent" orders can be made unless the parties agree to them or until the deplayed parent returns. This bill attempts to honor this federal law but in fact creates small anomalies (for example, a mandatory review within 30 days of the deployed parent's return) that cause confusion.

All of the factors in HRS Section 571-46 apply to any custody decision. All custody orders are based on the best interests of the child and are subject to a change in circumstances. The Family Court judges very carefully weigh all relevant factors according to the specific facts of each family. The fact of deployment certainly does not "trump" all other factors, for either parent.

This bill also seeks to make it possible for the deploying parent to take part in proceedings. This is not necessary for two compelling reasons. First, as noted above, the federal law will stay (freeze) the proceedings. But, second and just as importantly, the Family Court judges already apply as much flexibility as is fair. They routinely accept participation over the phone (that is, any device that allows audio and/or visual representation) absent any indicia of fraud. We cannot accept any other method of remote electronic communication (such as email) since we would be unable to verify the identity of the party.

The Family Court judges also attempt to expedite hearings if they are informed of the pending deployment and if the other parent has sufficient notice.

HRS 583A, Uniform Child-Custody Jurisdiction and Enforcement Act, commonly known as the UCCJEA, exists to ensure that the jurisdiction that is the "home state" of the child will have the authority over the case since that jurisdiction will have the best information regarding that child. There are portions of this bill that confuses this principle, to the eventual detriment of both parents and certainly the children. A large percentage of the military families stationed in Hawaii are from the Mainland. When a parent is deployed, it is not uncommon that the remaining parent returns home to be with family for both economic and other important support. With deployments lasting for a year and with multiple deployments, it will be inevitable that Hawaii will have the least contact with the children and families. Again, the consequences of this bill will be detrimental to both parents and the children.

This bill attempts to "delegate" visitation rights. This will lead to litigation and a derogation of the rights of competent parents to raise their children free of government interference. This is not in the children's best interest.

This bill may also run afoul of military requirements regarding caretaking plans of the parents. This bill may also cause tremendous confusion regarding child support obligations and military benefits.

Here are some comments to specific portions of this bill:

1. Page 3, from line 5: Statutes do not usually mandate what must be contained in motions. This section mandates a factual basis for the deployment,specifying when and how the non-deploying parent was notified. Although these facts may be relevant, they are not the only or even the most important facts to be alleged in custody requests. We understand that this is designed to ensure that notice is given as early as possible; however, there are many complicating factors, including the common possibility that the deploying parent may have received late notice.

2. Page 3, from line 14: An "across the board" mandate to the court to make an order to not exceed 30 days after the parent's return from deployment may not make sense in a large number of cases for a variety of reasons that will be specific to each case. This section means that, by statutory mandate, NO order (including those made as a result of agreement by the parents) can exceed this time frame, which will cause chaos in the ensuing vacuum. Also, so many changes can occur during the current deployment time periods, not the least of which would be the condition and needs of the returning parent.

3. Page 3, from line 17: This section (giving custody to the non-deploying fit parent) seems to state an obvious outcome and appears to be unnecessary.

4. Page 4, subsection (d), from line 1: This section mandates specific visitation orders in a manner which may be unrealistic to this island state and/or unrealistic depending on the specific situation of a family and/or a child.

5. Page 4, from line 12: This blanket statement, even with the word "may," "delegating" parental visitation rights is fraught with problems, both on a constitutional level as well opening up many possibilities for increased litigation to the detriment of both parents and the children.

6. Page 4, subsection (e) , from line 17: Given the length of current deployments, this attempt to retain exclusive jurisdiction over all cases that originate in Hawaii and thereby "trumping" the UCCJEA may result in the Hawaii courts retaining jurisdiction in cases where current relevant information is found out-of-state, again to the detriment of both parents and the children. We must bear in mind that, for a great many deployed parents, Hawaii is not home.

7. Page 5,subsection (f), from line 1: Open-ended review hearings are not productive. Such hearings would be made without a "demand" by a party or a specific reason, which would generally cause both great upset to the parents and a misuse of limited court time. While this bill seeks to protect interests of deploying parents, this section may serve to simply compound their uncertainty.

8. Page 7, from line 21: The definition of "parent" is too broad. It includes legal guardians as well as " . . . a person who has commenced legal proceedings to establish such relationship . . . ".

9. Page 8, from line 3: This definition of "return from deployment" is an example of the problems that the bill can create. For example, this bill requires all orders made before deployment to end 30 days after the parent's return. However, he/she could actually be at a new duty station under this definition (either indefinitely or up to 90 days). There is a similar problem with review hearings and keeping jurisdiction here in Hawaii.

In short, this bill does not add protections for non-deploying parents and, in fact, will inject much uncertainty into their lives.

Thank you for the opportunity to submit written comments on this matter.

STATE OF HAWAII
DEPARTMENT OF DEFENSE

TESTIMONY ON HOUSE BILL 2061 HD 1 SD 1
A BILL RELATING TO CHILDREN

PRESENTATION TO THE

COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

BY

MAJOR GENERAL ROBERT G. F. LEE
ADJUTANT GENERAL

March 24, 2010

Chair Taniguchi, Vice-Chair Takamine, and Committee members:

I am Major General Robert G. F. Lee, the Adjutant General of the Department of Defense, State of Hawaii.

I am submitting testimony in support of the intent House Bill 1942 HD 1 SD 1 but will be in strong support if the following amendments are implemented:

Page 2, line 11 replace "dependent" with "deployment".

Page 3, line 15 replace "thirty" with "fourteen". The intent is to quickly reunite the parent who returned from deployment with his or her children. This is an emotional time or parent and child and should happen as quickly as possible.

Page 3, lines 19-21 replace these 3 lines with "the court shall determine temporary custody and temporary child support according to law". It is inappropriate to dictate an outcome for the court regarding a custody decision because a process already exists.

Page 4, line 11 after "temporary order." add "The temporary order shall also require the non-deploying parent to provide the court and the deployed parent with thirty days advance written notice of any changes of address or telephone number affecting the child". This maintains a requirement from HB 2061 HD1 to ensure the parent who has custody of the child notifies the deployed parent if there is a move or change in phone number that affects the child.

Page 4, line 12 after "Upon request of the" add "deploying or". This ensures that delegated visitation can be requested during either the deploying or deployed stage, and is necessary to not limit only deployed parents from making such a request.

Page 4, line 16 change "delegate" to "delegate(s)". this plural from is necessary to ensure that grandparents, for example, can both be named as delegates, which allows either or both to visit the child. The option for more than one delegate should be decided by the court and not be limited by statutory language.

Page 4, line 21 replace the language after "until" with "the deployed parent returns from deployment and upon a further hearing, if necessary". The concept of a automatic post deployment review hearing is not necessary. There may be a hearing or there may not be a hearing. It depends on each specific case and the point of this subsection is to ensure that Hawaii retains jurisdiction until the parent returns from deployment.

Page 5, lines 1-7 delete the wording in subsection (f) and replace with "Any temporary custody orders for the child during the parent's deployment shall end no later than fourteen days after the parent returns from deployment and may include a specific transition plan and schedule for the parent's return from deployment". An automatic review hearing is not necessary, and should not be mandated or scheduled unless there is an actual issue that the court needs to decide. If there is a need for the court to hold a hearing, the amended subsection (g) makes it clear that such a hearing can be held upon the motion by a parent.

Page 5, lines 8-10 delete the wording in subsection (g) and replace with "Nothing in this section shall limit the discretion of the court to conduct an expedited hearing regarding custody or visitation upon the return of the deployed parent and the filing of a motion alleging an immediate danger of irreparable harm to the child when the temporary custody orders expire". This ensures that if a hearing is necessary, upon a parent's return from deployment, the court can conduct such a hearing. Such a hearing should not be automatic as this is not the normal procedure.

Page 5, lines 11-21 delete the wording in subsection (h) and replace with "A service member's absence due to deployment, or the potential for future deployment, shall not be the sole factor supporting change in circumstances or grounds to result in a permanent modification of an existing custody or visitation order". The existing service of process language conflicts with Hague Service Convention treaty requirements and must be deleted. Service of process overseas is country specific and must comply with the Hague Service Convention and Inter-American Service Convention. This new service of process language was not the intent of the bill. Instead, the issue of absence due to deployment not being the sole factor resulting in a material change of circumstances for a custody change must be emphasized. This language from HB 2061 HD1 must be retained to make the point that custody of a child should not be lost solely due to deployment.

Page 7, line1 replace "of 2000" with "or any other federal law". This ensures that this section is consistent with other federal law that applies to deployed overseas service members and is not limited to just the 2000 SCRA.

Page 7, line 10 delete ",whether". Definition of deployment requires meeting all the listed requirements.

Page 7, line 11 after "sixty days;" add "and".

Page 7, line 15 change "from" to "(4) From".

Page 7, line 22 change "or a child" to "of a child".

Again, to assist our military men, women, and their families, we are in strong support of HB 1942 HD 1 SD 1, only if the amendments recommended above are implemented.

Thank you for the opportunity to provide written testimony.

OAHU VETERANS COUNCIL

"a gathering place for veterans"
OAHU VETERANS CENTER

March 23, 2010

ADDITIONAL TESTIMONY IN SUPPORT OF THE INTENT OF HOUSE BILL 2061 HD1 SD1
CUSTODY AND MILITARY DEPLOYMENT

SENATE JUDICIARY AND GOVERNMENT OPERATIONS COMMITTEE

HEARING WEDNESDAY, MARCH 24, 2010 9:30 A,M., ROOM 016

Aloha Senators Brian T. Taniguchi, Chair, Dwight Y. Takamine, Vice Chair, and members of the Committee. My name is Fred Ballard, President Oahu Veterans Council. The Oahu Veterans Council is comprised of over 35 Oahu veteran organizations that in turn represent over 80,000 veterans and their families.

The Council is submitting additional testimony in support of the intent of House Bill 2061 HD 1 SD 1 but will be in strong support if the amendments outlined in MG Robert G.F. Lee, Adjutant General's written testimony are accepted. A lot of effort has been put into these amendments to ensure the bill meets its intentions.

Mahalo for allowing us the opportunity to provide further comment on this very important bill.

Fred Ballard
Fred Ballard
President
Oahu Veterans Council

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From: Tom Marzec [adamtm@lava.net]
Sent: Tuesday, March 23, 2010 12:36 PM
To: JGO Testimony
Subject: Testimony re: HB2061 HD1 SD1 Custody and military deployment, hearing 24Mar10 at 9:30 am

March 23, 2010

To: Senator Brian T. Taniguchi, Chair
Senator Dwight Y. Takamine, Vice Chair
Committee on Judiciary and Government Operations
Via email to: JGOTestimony@Capitol.hawaii.gov

From: Tom Marzec

Subj: Testimony re: **HB2061 HD1 SD1** Custody and military deployment

Hearing: Wednesday, March 24, 2010; 9:30 a.m.; Room 016, State Capitol

I support the intent of this bill, but oppose the SD1 version. The amendments to the SD1 version, proposed by Major General Lee of the Hawaii Dept. of Defense, are necessary for this bill to effectively meet its public policy intentions. I strongly support all of those amendments.

As a family court activist for reform and retired naval officer, I am well-aware of the special issues encountered by our military service members and families -- particularly with respect to family court actions. In addition, I collaborated on both the HD1 and SD1 versions of this bill and am very familiar with the issues and language. Discussions with the military community stakeholders indicate strong support for the Hawaii Dept. of Defense proposed amendments and these amendments will remove problems with the existing SD1 version language.

In the earlier hearing, the Public Safety and Military Affairs Committee and the Human Services Committee amended HB2061 HD1 with a SD1 version provided by the Family Law Section of the Hawaii State Bar Association. This essentially replaced most of the language in the HD1 version. Unfortunately, there were issues with the Family Law Section SD1 version and there wasn't agreement among the stakeholders.

For example, on page 5, line 11 subsection (h), the entire service of process section conflicts with Hague Service Convention treaty requirements. Service on the deployed parent was not a part of the previous HD1 version and was not intended to be addressed in this bill. This problematic addition in SD1, along with others, necessitates amendments in order to make the language acceptable. The Family Law Section framework in SD1 was generally a concise and practical application of most of the principles in the HD1 version; however, the problem areas require amendments.

Other states have passed similar legislation addressing child custody and visitation issues for deployed military parents and establishing a more defined process in Hawaii, via an amended version of this bill, would be a positive step forward.